No. 1821

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STEAMSHIP COMPANY (a corporation), claimant of the American steamship "Santa Rita", her tackle, apparel and furniture, and all persons intervening for their interests therein,

Appellants,

vs.

THOMAS HASKINS and MAX SCHWABACHER, partners doing business under the firm name of Leege & Haskins,

Appellees.

BRIEF FOR APPELLEES.

Applying to Case No. 1822 as well.

WILLIAM DENMAN,
Proctor for Appellees.

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This is an appeal from a decree of the District Court which confirmed the report of the commissioner to whom had been referred the matter of determining the injury to certain coffees. These coffees had been carried by the steamer "Santa Rita" from New York to San Fran-

cisco, and had been injured by fuel oil and fumes of the oil which had broken away early in the voyage and invaded the cargo tanks. The coffees had thus been twice through the tropics confined in tanks with the fuel oil gases.

All the testimony was taken *viva voce* before the commissioner and the sole question raised by the appeal is whether the commissioner's finding on the issue of fact as to the *amount* of injury to the coffees, which finding was sustained after careful argument and briefing in the District Court, should be set aside here.

No question is raised here as to the commissioner's finding of the *sound* value of the coffee, .11½ cents for the Schilling and .10½ cents for the Haskins shipment, and the only question is as to the finding of the damaged value in San Francisco, the port of delivery. This the commissioner found to be 5¼ cents in each case holding that the difference of one cent in the original value of the two shipments did not cut any appreciable figure in the value in their damaged condition.

The question then is, is there any evidence on which the commissioner could have reasonably found that 5¼ cents per pound was the damaged value of the coffee in San Francisco at the termination of the voyage. Even if there had been a conflict in the testimony the commissioner's finding could not be opened for it has been long established that his decision must be clearly against the evidence to be set aside in this court.

> "The question is not what the conclusion of this court should be on the testimony but whether the commissioner's report, sustained as it was, after full argument, by the District Court, *was so clearly erroneous* as to warrant us in setting it aside. The powers conferred upon a commissioner in admiralty causes are analagous to those of *masters in chancery* and his findings upon questions of fact depending upon conflicting testimony or upon the credibility of witnesses should not be disturbed unless clearly erroneous."
>
> *La Bourgoyne* (C. C. A.), 144 Fed. 781 at 783.

See also

> *Coastwise Transportation Co. v. Baltimore Steam Packet Co.,* 148 Fed. 837 (C. C. A.).

It is our contention that not only was 5¼ cents the damaged value of the coffee at San Francisco, at the time of the arrival of the "Santa Rita", but that no other finding could properly have been made.

I.

Evidence Supporting the Commissioner's Finding and the Decree of the District Court.

The evidence shows that the damaged coffees were nearly a week in the ship's possession on dock during which time the owners had abundant time to examine and sample them and determine the amount of their injuries. During that period the consignees settled with their insurance companies who took over the coffee. When the coffee was received by the insurance companies from the ship, there was an absolute delivery, no agreement being made with the ship that they would either hold or sell to the account of whom it may concern.

The insurance companies put the sale of the coffee in the hands of the long established firm of C. L. Bickford and Company, who offered it on the street and to all the large dealers, Folger, Hills, Schilling and others (Haskins case, page 34). As the quantity was very large the entire trade took a keen interest in it, and hence we were able to obtain a number of expert witnesses with personal knowledge of its condition. There were also introduced at the hearing samples upon which the experts and presumably also the commissioner in part based their opinions.

In all we offered seven expert opinions as to the value in San Francisco at the time of the arrival, some in the Haskins case and some in the Schilling case. Two of them were entirely disinterested, George Werlin, the broker, and Ben Levinger, an expert in the employ of

Brandenstein & Co., having no connection with any of the coffees consigned to Schilling or Leege and Haskins, though both had examined them. The other five were: O'Brien, the broker, who made fifty cup tests, Falkenham, who sampled every bag, Bickford, who was the head of the firm of brokers handling the coffee, Schilling, one of the consignees, and Lewin, an expert and dealer who purchased it. They testify as follows:

George Werlin, disinterested expert, says at pages 27 and 28 of the Schilling case:

"The coffee was damaged by what I call creosote.

Q. Was that odor perceptible?

A. Very strong.

Q. Would you recollect it if you were to encounter it again?

A. Yes, sir.

Q. Let me ask you to examine this sample.

Mr. KNIGHT. You will notice, Mr. Reporter, that the sample has been kept tightly corked, and was uncorked and immediately corked up again.

A. (After examination) That is the same odor.

Mr. DENMAN. Q. Now let me ask you if you will taste a bean of this coffee from Libelant's Exhibit No. 1 (handing).

A. (After examination) I find the same odor in this—the same taste as the odor shown in the other. The odor and the taste is the same thing anyway.

Q. What was the price that Mr. Lewin said that he paid for that coffee?

A. 5¼ cents.

Q. Do you consider that a fair value for coffee that is imported such as this?

A. No, I consider it an excessive price, and I so expressed myself at the time."

Ben Levinger, disinterested expert, says at pages 71 and 72 of the Schilling case:

"Would you say that 5¼ cents was a fair value for the coffee at the time of the arrival in port of the 'Santa Rita'?

A. If the coffee had been mine at that time I would have accepted the bid if I could have gotten it.

Q. Would you have considered that a fair price for it?

A. Yes, sir."

Mr. Schilling, consignee who had settled with insurers and hence was disinterested, at pages 40 and 41 of the Schilling case, testified as follows:

"Q. Would any reputable dealer in San Francisco that you know use such a coffee as that for roasting purposes?

A. No, sir.

Q. Is there any commercial purpose in San Francisco that you know of to which that coffee could be put?

A. No reputable purpose. A man might buy that coffee with the object of mixing it in with a lot of other coffee, and he would take his chances that the taste of the damage of the creosote would not be detected.

Q. Do you think he would be able to succeed?

A. No, sir.

Q. Would that be an honorable practice, to do that?

A. It certainly would not.

Q. Would 5¼ cents be a fair price for that coffee in January, 1907?

A. I think it would be a very high price.

Q. Do you think the coffee is worth that much?

A. No, sir."

J. O. Falkenham, who inspected every bag (pages 56 and 57) in the course of his duties, and did not know who owned the coffee (page 64), says at pages 60-61 of the Schilling case:

"Q. Would you consider 5¼ cents a pound a fair price for those damaged coffees that you examined?

A. I would consider that ample.

Q. You would consider that an ample price?

A. Yes.

Q. How long have you been in the coffee business?

A. 14 years."

O'Brien, a coffee broker who made over fifty roasting tests (31, 32, 38, 39), says at page 52 of the Haskins case:

"Q. You said 5¼ cents a pound was a fair price for that coffee when you sold it. Do you still hold that that was a fair price for the coffee, in that condition?

A. I do, most emphatically.

Q. Now taking into consideration the condition of the coffee market since that time, what is your opinion as to the price 5¼ cents for the coffee at that time?

A. It is my opinion that five cents could not be obtained for the coffee to-day."

"Mr. Bickford had had many years' more experience than myself, and he recommended that coffee to be sold. In fact it was with his knowledge and on his recommendation that the coffee was sold at five and a quarter cents." (O'Brien, p. 57.)

Lewin, coffee speculator, our opponents' witness, says at page 151 of the Haskins case:

"Q. How long have you been a coffee broker?

A. I have been in the coffee business for 25 years.

Q. Now let me ask you in view of your knowledge of this coffee, the information that you gained as an expert since them, and the history of the coffee and your general expert knowledge on coffees, do you think 5¼ cents was a fair price for the coffee at the time you purchased it?

A. By all means, I would not buy it today if that thing were repeated; I would not buy it by no means."

Against the opinion of these seven experts, the ship offers one witness, George C. Cambron. This gentleman admitted that he had never seen the Haskins or Schilling coffees. He had seen a sample which was not shown to have been made up generally from the coffee in question, and he finally admitted he knew very little about it (Haskins case, page 71). He bases his testimony entirely on the condition of the Brandenstein shipment which is not concerned here and was not shown to have been in the same hold of the "Santa Rita", and hence exposed to the same conditions as the coffees at bar. He testifies that the damaged value of the Brandenstein coffees *in September* was 6 cents. For a fair comparison with the coffees at bar we must deduct one per cent a month, or 7% for the cost of keeping the coffee from

January to September (Levinger, page 75), and consider what effect on the September market for the Brandenstein coffee the presence of the huge quantity of damaged Schilling and Haskins coffee would have had. It is apparent there is no great discrepancy in the valuations.

It is submitted that the seven expert opinions as to the value of the coffees in question at the date of arrival, outweigh the one expert opinion of the value of other coffee many months thereafter.

II.

A Sale at St. Louis, Two Thousand Miles Away, is no Criterion of Value at San Francisco, the Port of Delivery.

The coffees were sold by the insurance company to Mr. Lewin, a speculator. Mr. Lewin was told by the expert Werlin that he had been "stung" (Schilling case, page 26), and evidently concluded to pass his misfortunes to the shoulders of someone else. He re-bagged the coffee and shipped it out of the State to St. Louis, selling it to a St. Louis buyer for the "nigger" trade, for 6½ cents. His turn probably netted him nearly a cent a pound but it was common knowledge among the coffee experts that the unfortunate vendee has not been able to dispose of the coffee in December, 1908, nearly two years after (Haskins, page 35, 36).

However, whether or not the St. Louis buyer was, in the classic language of the coffee trade, "stung" or "soaked", it is clear law that the value at St. Louis, two thousand miles away, is no criterion of the value at the port of delivery.

Carver's Carriage by Sea, 4th Ed. §727;
Texas Ry. v. White, 80 S. W. 641;
Railway Co. v. De Shon, 39 S. W. 250.

Our opponent did not seriously oppose this contention in the court below. We do not believe that he does so here.

III.

The Shipment Out of the State to Evade Attacks Through the Pure Food Laws.

It is admitted by our opponents' brief that the coffees in question were edible, and hence that it was justifiable to attempt to sell them. It appears, however, that the insurance policies on the Brandenstein shipment were against *actual total loss* and that the Brandenstein Company could recover from its insurer only on the theory that the coffees were entirely unfit for consumption. The Brandenstein people started a movement to have them condemned on that ground.

Our opponent has shown that this would have been unsuccessful, but nevertheless, it would have consumed time and hurt the value not only of the Brandenstein coffee but of the Haskins and Schilling coffees as well.

The insurance companies therefore sold promptly to Lewin, not however, without first covering the whole San Francisco market, as we have before pointed out. The companies thereafter had nothing to do with the coffees, either in their resacking or their shipment out of the State.

Our opponents seem to find some extraordinary significance in the fact that the Schilling coffees were sold to Lewin for *almost* half and the Haskins coffees for half their market value. Yet the only policies shown were those against *actual total loss,* and a constructive total loss would have availed the shippers nothing.

Further it appears that the insurance companies had paid their policies, taken the coffee and were selling it for themselves. What earthly benefit they could have gained by depressing the price under half its sound value, or at all, is beyond our comprehension.

In conclusion, we submit that the commissioner's decision and the decree of the lower court are sustained by the opinions of the seven experts and should stand.

WILLIAM DENMAN,
Proctor for Appellees.